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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GUADALUPE GONZALEZ, JR., Appellant.	2 CA-CR 2008-0373 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20081601

Honorable John S. Leonardo, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Guadalupe Gonzalez, Jr. appeals from his convictions and sentences for two counts of second-degree murder.[1] He asserts the trial court abused its discretion in excluding evidence and denying his requested jury instructions. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Gonzalez's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Around midnight on April 15 or 16, 2008, Gonzalez was in Pima County traveling southbound on Kino Parkway at approximately seventy miles per hour (mph) when he drove through a red light at 22nd Street, colliding with an eastbound Thunderbird and killing its driver, L., and her passenger, A. At the moment of impact, Gonzalez was traveling approximately fifty-nine mph, nineteen mph over Kino Parkway's posted speed limit of forty mph. L. was traveling approximately forty-eight mph, eighteen mph over 22nd Street's thirty-mph speed limit. Before coming to rest, Gonzalez's truck also struck a minivan traveling behind the Thunderbird and a northbound taxicab stopped at the red light on Kino Parkway. Laboratory analysis showed Gonzalez had ingested cocaine before driving and his alcohol concentration one hour after the collision was .201. Laboratory analysis from L.'s autopsy showed therapeutic levels of the prescription painkiller oxycodone in her bloodstream.

[1]Gonzalez was convicted and sentenced for other offenses, but his arguments pertain only to his convictions and sentences for second-degree murder.

¶3 Gonzalez was indicted for two counts of second-degree murder, four counts of endangerment with a substantial risk of imminent death, and one count each of driving under the influence of an intoxicant (DUI), extreme DUI, driving with an alcohol concentration of .08 or more, driving with an illegal drug or its metabolite in his body, and criminal damage. At his jury trial, after the state rested, Gonzalez successfully moved for a judgment of acquittal on the criminal damage charge. At the conclusion of his three-day trial, the jury found Gonzalez guilty of the remaining counts, but on two counts of endangerment with a substantial risk of imminent death, the jury found him guilty of the lesser included offense of endangerment with a substantial risk of physical injury. The trial court sentenced Gonzalez to consecutive, mitigated, ten-year prison terms for both second-degree murder counts and, on the remaining counts, to concurrent terms ranging from six months in jail to one year's imprisonment. This appeal followed.

Discussion

Oxycodone Evidence

¶4 Gonzalez first argues the trial court erred in considering the state's motions in limine seeking to preclude evidence that L. had oxycodone in her bloodstream at the time of her death. The state's first motion in limine, filed September 12, 2008—four days before trial—argued that information would "confuse or mislead the jury" because there was no evidence "there was anything erratic in [L.'s] driving behavior." The court denied that motion, concluding the evidence would be relevant to Gonzalez's defense.

¶5 On the first day of trial, the state moved to preclude Gonzalez from mentioning in his opening statement the presence of oxycodone in L.'s bloodstream, arguing Gonzalez would be unable to establish a proper foundation for the admission of that evidence. The trial court denied the motion, noting it would determine during the medical examiner's testimony if the evidence was admissible, but it cautioned Gonzalez that, if anything he "proffer[ed] in [his] opening statement . . . [was not] proved up[, that] of course will work to their detriment in the case." On the second day of trial, the court asked that both the state and Gonzalez present argument regarding the admissibility of the oxycodone evidence. After the medical examiner testified out of the jury's presence concerning the laboratory report, the court concluded the oxycodone evidence was inadmissible hearsay and, in any event, was inadmissible under Rule 403, Ariz. R. Evid., because "any relevance" was "outweighed by the potential confusion to the jury."

¶6 Gonzalez asserts the state's motions were untimely pursuant to Rule 16.1(b), Ariz. R. Crim. P., and the trial court therefore could not consider them under Rule 16.1(c). Rule 16.1(b) requires that "[a]ll motions shall be made no later than 20 days prior to trial, or at such other time as the court may direct." On July 24, with trial scheduled to begin on September 16, the court had directed that all motions be made "no later than August 21, 2008." Pursuant to Rule 16.1(c), untimely motions "shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it."

¶7 Nothing in the record suggests the state could not have moved to preclude the evidence before the August 21 deadline the trial court had imposed, and the state does not argue otherwise. Nor did it offer any explanation for its late motion when Gonzalez raised this issue during the hearing on the state's first motion in limine. The state instead asserts that any error was harmless because the court denied its first motion in limine. The state misconstrues Gonzalez's argument. He does not limit his Rule 16.1 challenge to the state's first motion in limine but instead argues the state should have raised all of its objections to the admission of the oxycodone evidence before the court's initial deadline. The state's failure to have done so, he contends, precluded it from objecting to admission of the evidence.

¶8 But the preclusion provision of Rule 16.1(c) is not mandatory. Rather, because Rule 16.1(b) permits a trial court to modify the deadline for motions, if it "wishes to entertain a late motion in limine, it may do so" in the exercise of its discretion. *State v. West*, 176 Ariz. 432, 442, 862 P.2d 192, 202 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998); *see also State v. Cramer*, 174 Ariz. 522, 523, 851 P.2d 147, 148 (App. 1992); *State v. Zimmerman*, 166 Ariz. 325, 328, 802 P.2d 1024, 1027 (App. 1990); *State v. Vincent*, 147 Ariz. 6, 8-9, 708 P.2d 97, 99-100 (App. 1985). Gonzalez does not acknowledge *West* or any similar authority in his briefs, arguing only that the trial court was required to preclude the state's motions in limine

under Rule 16.1(c). Because Gonzalez does not assert the court abused its discretion in considering the motions, we do not address this argument further.[2]

¶9 The trial court precluded the oxycodone evidence under Rule 403 because it found the probative value of the evidence was substantially outweighed by the possibility it would confuse the jury. Gonzalez asserts the court erred in doing so, arguing the evidence was "highly probative and relevant to [L.'s] driving and the defense in this case: the cause of the accident." "Because the trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion." *State v. Canez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002).

¶10 Assuming, without deciding, that the oxycodone evidence was relevant, its probative value on any issue was minimal. First, there was no evidence the oxycodone in L.'s bloodstream affected her driving or could have contributed to the collision. Even had the medical examiner testified, as Gonzalez suggests, that oxycodone generally causes sleepiness, there is no evidence the levels in L.'s bloodstream would have made her sleepy enough to impair her driving.[3]

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[2]Gonzalez asserts he was "prejudiced" by the state's late motions "and the trial court's late ruling" because he could have prepared and presented additional evidence to overcome the state's objections, including evidence "about the effects of Oxycodone." But, as we explain infra, even if Gonzalez could present evidence that L.'s driving had been impaired by oxycodone, the oxycodone evidence would not have been significantly more probative, and its preclusion would still have been proper under Rule 403, Ariz. R. Evid.

[3]Gonzalez also asserts the medical examiner could have testified "there was no medical reason for [L.] to have [had] Oxycodone in her system." This assertion is significantly broader than his claim below that the medical examiner could testify L. had

¶11 Moreover, even if the oxycodone had impaired L.'s driving, a victim's contributory negligence is not a defense to homicide. *See State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983). Relying on *Shumway*, Gonzalez asserts that whether L. was impaired nonetheless is relevant and admissible. In *Shumway*, the defendant collided with the decedent's oncoming vehicle as she attempted a left turn. *Id.* at 587, 672 P.2d at 931. The trial court refused the defendant's requested jury instruction that the decedent was obligated to yield to oncoming traffic. *Id.* at 588, 672 P.2d at 932. Our supreme court reversed, stating that "the trier of fact may still consider the decedent's conduct when determining whether the defendant's act was criminally negligent." *Id.* The court reasoned in *Shumway* that the decedent's conduct was relevant "because her failure to yield the right of way could relieve the defendant of criminal responsibility," and, accordingly, if the defendant proved "that he expected the victim to yield and, therefore, did not slow down as he approached the intersection[,] [t]he jury might . . . conclude that the defendant's failure to slow down was not criminal negligence." *Id.*

¶12 *Shumway*'s reasoning does not suggest the oxycodone evidence here was admissible under Rule 403. First, our supreme court addressed in *Shumway* whether the decedent's conduct was relevant. Rule 403 analysis presupposes the evidence is relevant. And the decedent's conduct in *Shumway* was far more probative of the defendant's culpability than the oxycodone evidence here. In contrast to *Shumway*, the jury here

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"had no previous injuries to explain why she would be on a prescription for oxycodone." In any event, whether L.'s oxycodone use was legitimate is not relevant.

could not reasonably conclude Gonzalez had been permitted to proceed legally through the intersection or that L.'s negligence had caused the collision.[4]

¶13 Gonzalez was charged with second-degree murder, of which reckless manslaughter and negligent homicide are lesser-included offenses. *See State v. Hurley*, 197 Ariz. 400, ¶ 14, 4 P.3d 455, 458 (App. 2000); *State v. Nieto*, 186 Ariz. 449, 456, 924 P.2d 453, 460 (App. 1996); *see also* A.R.S. §§ 13-1102 (negligent homicide); 13-1103 (manslaughter); 13-1104 (second-degree murder). Gonzalez conceded in closing argument that he had negligently caused L.'s and A.'s deaths. The question before the jury thus was whether Gonzalez had caused their deaths by being criminally negligent, § 13-1102(A), by being reckless, § 13-1103(A)(1), or by "recklessly engag[ing] in conduct that create[d] a grave risk of death" "[u]nder circumstances manifesting an extreme indifference to human life." § 13-1104(A)(3).

¶14 A person is criminally negligent when he or she "fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." A.R.S. § 13-105(10)(d). "The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." *Id.* A person is reckless if he or she "is aware of and

[4]One eyewitness testified Gonzalez had stated he had a green light when he entered the intersection. We recognize that, in determining whether evidence is admissible, we should construe the evidence in the light most favorable to the evidence's proponent. *See State v. Kiper*, 181 Ariz. 62, 66, 887 P.2d 592, 596 (App. 1994). But, as we discuss infra, the evidence that Gonzalez did not have the right of way was overwhelming.

consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." § 13-105(10)(c). "The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." *Id.* Notably, "[a] person who creates such a risk but who is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk." *Id.*

¶15 Gonzalez ran a red light, driving more than fifty-nine mph—nearly twenty mph over the speed limit—through a crowded intersection, with an alcohol concentration of .201. Whether his victim was also impaired while traveling with the right of way, albeit in excess of the speed limit, mitigates neither the recklessness of Gonzalez's conduct nor the extreme risk his conduct created. Nor would L.'s possible impairment affect whether Gonzalez's actions manifested "an extreme indifference to human life." § 13-1104(A)(3). Finally, even if L. was impaired, no evidence suggested that, absent such impairment, she could have avoided the collision, and Gonzalez does not contend that admitting the oxycodone evidence could have established such a fact.[5] Indeed, one eyewitness testified it would have been impossible for Gonzalez not to have struck at least one vehicle because the intersection was so crowded. Thus, that L. had oxycodone

[5]Gonzalez asserts L. could have avoided the collision, had she not been impaired, because another driver "was able to perceive [Gonzalez]'s vehicle and avoid the accident." But, as the state correctly points out, that driver was two cars behind L. That a driver two car lengths behind L. managed to avoid colliding with Gonzalez does not remotely suggest L. should have been able to do so. Indeed, the driver of the minivan immediately behind L. testified she had not had time to brake after seeing Gonzalez's vehicle enter the intersection, let alone avoid the collision with her vehicle.

in her bloodstream at the time of her death is of marginal probative value, even if Gonzalez were able to demonstrate her driving actually had been impaired as a result.

¶16 We also agree with the trial court that there was a substantial risk the evidence could have confused the jury. Admitting the evidence would have entailed unnecessary testimony regarding the effect of oxycodone and the extent of L.'s impairment. The goal of Rule 403 is to avoid the danger that, "'in attempting to dispute or explain away the evidence thus offered, new issues will arise . . . and the multiplicity of minor issues will be such that the jury will lose sight of the main issue.'" *State v. Gibson*, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002), *quoting* Joseph M. Livermore et al., *Arizona Law of Evidence* § 403, at 86 (4th ed. 2000). When the probative value of the evidence is minimal, there is a greater probability that confusion or waste of time will substantially outweigh its value. *See id.* The court therefore did not abuse its discretion in precluding the oxycodone evidence pursuant to Rule 403.[6] Because we conclude the evidence was precluded properly on that basis, we need not address Gonzalez's arguments that the court erred in determining the evidence was inadmissible hearsay.

¶17 Gonzalez additionally argues the trial court's order precluding the evidence deprived him of his constitutional right to present his defense. But "well-established

[6]Gonzalez further argues that, because the state was permitted to introduce evidence "about the presence of cocaine in [his] blood without evidence as to when it was taken or its effect," "the same principles should apply" to the oxycodone evidence. But Gonzalez was charged with driving with an illegal drug or its metabolite in his system. *See* A.R.S. § 28-1381(A)(3). Thus, the cocaine evidence was relevant to that charge and admissible on that basis. Nothing about its admission suggests the oxycodone evidence should also have been admitted.

rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). Because the court properly excluded the evidence under Rule 403, we find no violation of Gonzalez's constitutional rights.

Jury Instructions

¶18 Gonzalez next asserts the trial court abused its discretion in denying three of his requested jury instructions. We review the refusal to give a proposed instruction for an abuse of discretion. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). A party is not entitled to an instruction on any theory of the case unless it is reasonably supported by the evidence. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). The refusal to give an instruction is not reversible error unless the defendant demonstrates prejudice. *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 31, 42 P.3d 1177, 1185 (App. 2002).

¶19 Gonzalez requested a jury instruction on intervening and superseding causes. A proximate cause is "'that which, in a natural and continuous sequence, unbroken by a[superseding] cause, produces an injury, and without which the injury would not have occurred.'" *Cent. Alarm of Tucson v. Ganem*, 116 Ariz. 74, 76, 567 P.2d 1203, 1205 (App. 1977), *quoting Brand v. J.H. Rose Trucking Co.*, 102 Ariz. 201, 205, 427 P.2d 519, 523 (1967). In contrast, an intervening cause is an event that occurs between the defendant's original act of negligence and the final result. *Robertson v.*

Sixpence Inns of Am., Inc., 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). An intervening cause becomes a superseding cause relieving the defendant of liability if it was unforeseeable and extraordinary. *Id.* An intervening cause is not a superseding cause if the defendant's negligence created a risk the particular harm that happened would occur. *State v. Slover*, 220 Ariz. 239, ¶ 11, 204 P.3d 1088, 1093 (App. 2009); *Young v. Envtl. Air Prods., Inc.*, 136 Ariz. 206, 212, 665 P.2d 88, 94 (App. 1982), *modified on other grounds and aff'd*, 136 Ariz. 158, 665 P.2d 40 (1983); *Parness v. City of Tempe*, 123 Ariz. 460, 464, 600 P.2d 764, 768 (App. 1979).

¶20 Quoting *State v. Bass*, 198 Ariz. 571, ¶ 11, 12 P.3d 796, 800-01 (2000), Gonzalez's requested instruction correctly stated the law on intervening and superseding causes. It provided that "[a]n intervening event becomes a legal excuse, i.e., a superseding cause only when its occurrence was both unforeseeable and when with the benefit of hindsight, it may be described as abnormal or extraordinary." Gonzalez argued below, as he does on appeal, that superseding causes of the collision and L.'s death were that L. had been driving in excess of the speed limit and the impact of the collision had caused her seatbelt to separate. The trial court refused to give the instruction, suggesting those events were foreseeable and reasoning the evidence was insufficient to warrant the instruction.

¶21 As best we understand his argument, Gonzalez contends on appeal that L.'s speeding was a superseding cause of the collision and, hence, of the deaths of L. and A. He asserts his own "statement that he believed his light was green was some evidence

showing he might not have caused the collision 'but for' [L.]'s speeding." This argument is perplexing. Defense counsel admitted Gonzalez was guilty of negligent homicide, thereby implicitly conceding he had run a red light. *See* § 13-1102 ("A person commits negligent homicide . . . [by] caus[ing] the death of another person.").

¶22 Moreover, as we noted above, no reasonable jury could have concluded Gonzalez's light was green. The driver of a vehicle behind the minivan testified that, after the collision, Gonzalez "was walking kind of like out of it, saying that the light was green." But this witness also testified she had "absolutely no doubt" her light was green. The minivan's driver, who was traveling behind L., similarly testified her light was green. The driver and passenger of a southbound vehicle, traveling in the same lane as Gonzalez on Kino Parkway, testified their light was red. The taxicab's driver, who was stopped in the southbound lane on Kino Parkway, also testified that his light was red.[7] And there were several other vehicles in the intersection whose direction of travel was perpendicular to Gonzalez's. Thus, in order to conclude Gonzalez had the right of way, the jury would have had to conclude that all of those witnesses were not credible and that L. had run a red light along with several other drivers. No reasonable jury could have done so.

[7]Contrary to Gonzalez's contention, even had the jury unreasonably concluded Gonzalez's light had been green, an instruction on intervening causes still would have been unwarranted. If Gonzalez's light had been green, L.'s negligence in running a red light would have been the proximate cause of the accident. Her negligence plainly would not have been a superseding cause, which presupposes another person's negligence having set in motion the events leading to the resulting harm.

¶23 L.'s speeding might have been, at most, an intervening cause of the collision. Assuming L. would have been in a different place in the intersection had she been driving the speed limit, Gonzalez might not have hit her. Running a red light, however, creates the risk of numerous harms, including collisions and casualties. And by running a red light, Gonzalez created the very risk of harm—a collision—that, in fact, occurred. L.'s speeding therefore would not relieve Gonzalez of liability. The same analysis applies to Gonzalez's further assertion, as best we understand it, that L.'s seatbelt failure was a superseding cause of her death. Gonzalez's running a red light created a risk of the very harm—a casualty—that materialized. Even if L.'s seatbelt failure contributed to her death, it would not relieve Gonzalez of liability. Thus, the trial court correctly concluded the evidence did not support an instruction on intervening and superseding causes.[8]

¶24 Gonzalez also requested two jury instructions addressing L.'s conduct and the other circumstances surrounding the collision. One instruction provided that, "[i]n a criminal prosecution for second degree murder or manslaughter, you may consider decedent's conduct when determining whether defendant's act was criminally reckless." Gonzalez cited *Shumway* in support of this proposition. The other requested instruction similarly provided that, in determining whether the state had shown Gonzalez had acted

[8]Gonzalez also argues the trial court erred in deciding what he asserts is a jury determination—whether L.'s speeding and seatbelt failure were unforeseeable and thus superseding causes. Because we conclude on other grounds that his requested instruction was unwarranted, we need not address this argument.

recklessly, the jury could consider "[e]vidence of defendant's driving while under the influence of intoxicating liquors and evidence of the actions of the victim . . . together with other circumstances." Gonzalez sought these instructions because the "crux of [his] defense" was that his liability was negated or lessened by trial testimony that L. was speeding at the time of the collision and by other excluded evidence that L. had therapeutic levels of oxycodone in her bloodstream. The oxycodone evidence, however, was precluded properly, and we do not consider it in determining whether Gonzalez was entitled to his requested instructions.

¶25 As we have explained, L.'s speeding and seatbelt failure could not relieve or lessen Gonzalez's culpability because they were not superseding causes of the collision or the resulting deaths of L. and A. To the extent L.'s speeding and seatbelt failure were relevant to whether, by running a red light while intoxicated, Gonzalez recklessly had created a grave risk of death under circumstances manifesting an extreme indifference to human life, the evidence was overwhelming that he had. Although Gonzalez again relies on *Shumway*, the facts showed the defendant there might have had the right of way, thus potentially absolving him of criminal liability. Here, no reasonable jury could have found Gonzalez had entered the intersection legally.[9] Thus, any error in

[9]Gonzalez also relies on *United States ex rel. Means v. Solem*, 646 F.2d 322 (8th Cir. 1980), in support of the proposition that he was entitled to an instruction on his "theory of defense." The Eighth Circuit in *Means* stated a criminal defendant "is entitled to an instruction on his theory of the case if there is evidence to support it." *Id*. at 328. But, even if the evidence here supported Gonzalez's requested instructions, there was overwhelming evidence that he had acted with extreme indifference to human life.

refusing Gonzalez's requested instructions was harmless. *See State v. McKeon*, 201 Ariz. 571, 573, 38 P.3d 1236, 1238 (App. 2000) ("Error is harmless if we can conclude beyond a reasonable doubt that it did not influence the verdict.").[10]

Disposition

¶26 For the foregoing reasons, we affirm Gonzalez's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

[10]Because any error in refusing the instruction was harmless, we need not address Gonzalez's argument that denying the instructions deprived him of a fair trial, in violation of the United States and Arizona Constitutions. *See* U.S. Const. amend. XIV; Ariz. Const. art. II, § 4.